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IN THE

Supreme Court of the United States

October Term, 1967

No. ~~1261~~

LEWIS P. GOLDMAN,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

JURISDICTIONAL STATEMENT

GOLDMAN & COOPERMAN
Attorneys for Appellant
485 Madison Avenue
New York, New York 10022

ROBERT E. GOLDMAN
STEPHEN R. WIENER
Of Counsel

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Opinion Below

The opinion of the Court of Appeals of the State of New York, the only opinion rendered by any court below, as yet unreported, appears at Appendix B, *infra*, pp. 3a-10a.

The judgment of the Court of Appeals was entered on December 28, 1967 and appears at Appendix C, *infra*, pp. 11a-12a.

Jurisdiction

Appellant, a member of the New York City Police Department, was convicted of perjury based on testimony given before the grand jury. Judgment was entered against the appellant on March 14, 1966. Said conviction was appealed in the Appellate Division of the Supreme Court on the constitutional grounds that the statutory provisions set forth by Section 1123 of the City Charter of the City of New York, requiring public officers to waive immunity and testify before a grand jury or forfeit their livelihood, was constitutionally repugnant to the United States Constitution, Amendments V and XIV. The Appellate Division of the Supreme Court of the State of New York unanimously affirmed, without opinion, on March 2, 1967. An appeal was taken therefrom to the Court of Appeals of the State of New York by the service and filing of a notice of appeal on March 14, 1966. The grounds of said appeal were similarly that compliance with Section 1123 of the Charter of the City of New York was constitutionally repugnant to the Constitution of the United States, Amendments V and XIV. The Court of Appeals unanimously affirmed and judgment entered accordingly on December 28, 1967. A notice of appeal to this Court contesting the constitutional validity of Section 1123 of the New York City Charter in addition to setting forth other substantial federal questions repugnant to the privileges and immunities conferred by the United States Constitution was served and filed on February 21, 1968. The jurisdiction of this Court to review is conferred by 28 U.S.C. §1257(2) in that there was drawn in question the validity of Article I, Section 6

of the New York State Constitution and Section 1123 of the New York City Charter on the ground that they were repugnant to the Constitution of the United States and the decision was in favor of their validity. Alternatively, certiorari jurisdiction is conferred by 28 U.S.C. §1254(1) in that the holding below is repugnant to the privileges and immunities conferred by the Constitution of the United States, Amendments V and XIV. That jurisdiction exists in the circumstances of this case is sustained by the following decisions: *Torcaso* v. *Watkins*, 367 U.S. 488; *Adamson* v. *California*, 332 U.S. 46; *King Mfg. Co.* v. *Augusta*, 277 U.S. 100; *Poulos* v. *New Hampshire*, 345 U.S. 395, 402; *Garrity* v. *New Jersey*, 385 U.S. 493; *Stevens* v. *Marks*, 383 U.S. 234; and *Spevak* v. *Klein*, 385 U.S. 511.

Constitutional Provisions and Statutes Involved

The constitutional provisions involved are the First, Fourth, Fifth and Fourteenth Amendments of the Constitution of the United States.

The texts of all sections of statutes are set forth in full in Appendix A, *infra*, pp. 1a-2a.

New York State Constitution, Article I, §6, Manual for the Use of The Legislature of the State of New York, 1966-1967, p. 16 (John P. Lomenzo, Secretary of State, Albany, N.Y.); McKinney's Laws of New York Annotated, Book 2, Part 1, Constitution, pp. 12-13 of 1967 Pocket Supplement (Edward Thompson Company, Brooklyn, N.Y.).

New York City Charter §1123, New York City Charter and Administrative Code Annotated, Vol. 1, p. 30 (Williams Press, Inc., Albany, N.Y. 1963).

Questions Presented

1. Is Article I, Section 6 of the New York State Constitution and Section 1123 of the New York City Charter repugnant to the United States Constitution in that a public officer who refuses to sign a waiver of immunity and claims a privilege against self-incrimination suffers a penalty of loss of his position and is thereafter barred from public employment?

2. Was the threat of dismissal from his employment made to appellant should he choose to invoke his constitutionally guaranteed privilege against self-incrimination, pursuant to Section 1123 of the New York City Charter, in violation of said privilege against self-incrimination, his right to due process and his privileges and immunities under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States?

3. Can the appellant's testimony, obtained by depriving him of his privilege against self-incrimination, and denyng him the right to remain silent, be used for any purpose in a subsequent criminal proceeding against him without violating his constitutionally guaranteed rights under the Fourth, Fifth and Fourteenth Amendments to the Constitution of the United States?

Statement

The appellant was a member of the Police Department of the City of New York for nineteen years and six months. On September 24, 1964, while still performing his duties as a uniformed patrolman, appellant was subpoenaed to ap-

pear before the grand jury and requested to execute a waiver of immunity. Before executing said "waiver" and again before giving any testimony, he was advised by the Assistant District Attorney that he could invoke his federal privilege against self-incrimination only on pain of losing his public employment; that to retain his job he was obliged to sign a waiver; and that should he sign a waiver he would have no immunity in answering incriminating questions. Faced with this admonition, petitioner signed the "waiver" and testified the testimony thus obtained, which concerned itself with whether or not appellant "knew" or "received anything" from an individual named Johnson four years earlier, was used as the basis of an indictment and conviction for perjury. Pursuant to said conviction, petitioner was sentenced to a term of incarceration of eighteen months to three years in the New York State Penitentiary. Petitioner is presently on bail pending the outcome of his appeal.

Appellant contends, as he did in the courts below, that his testimony was obtained by coerced compliance with a statute (§1123 of the New York City Charter) that is repugnant to the Constitution of the United States, Amendments I, IV and XIV. Consequently he was placed in a constitutionally proscribed dilemma; and that he was coerced into giving testimony in violation of his privilege against self-incrimination in that he was denied the right to remain silent and not be a witness against himself; nor did he receive any immunity or testimonial protection in the event that truthful statements might have incriminated him. That in such event the state had no right to demand and extract incriminating testimony and *a fortiori* he can-

not be held criminally accountable for failing to give it. Similarly, any testimony given was involuntary and likewise cannot be the basis of a criminal prosecution. That to permit a criminal prosecution to be premised on testimony obtained under such duress is to deny appellant his constitutionally guaranteed right against self-incrimination and equal protection of the law.

Said contentions were presented in the briefs filed in the Appellate Division of the Supreme Court of the State of New York thereby raising the federal question. Further, the same contentions were made to the Court of Appeals of the State of New York that the application of the statute, the appellant's dilemma, the coerced testimony and its subsequent use in a criminal proceeding were all repugnant to the United States Constitution. The questions presented to the Appellate Division and the Court of Appeals of the State of New York and the recitation of the facts in the opinion of that court were of a nature to bring this case within the statutory provisions believed to confer jurisdiction on this Court. 28 U.S.C. §§1257(2) and 1254 (1).

The Question Is Substantial

1. The federal question is substantial. The statute herein (§1123 of the City Charter of the City of New York) provides that where any city employee refuses to testify concerning city affairs "on the ground that the answer would tend to incriminate him, or shall refuse to waive immunity from prosecution * * * his term or tenure shall terminate." That section is in all substantial respects

identical to Section 903 of the New York City Charter which was held to be violative of the due process clause of the Fourteenth Amendment by this Court in *Schlochower* v. *Board of Education*, 350 U. S. 551, in that it upholds automatic termination of employment upon invocation of the privilege against self-incrimination.

That such a penalty can be imposed on public officers should they exercise their constitutional privilege is the underlying premise of the decision in the court below. The result therein reached is dependent on the validity of the precise procedure that *Schlochower* condemned as unconstitutional and is therefore in direct conflict with the decision of this Court. As in the instant case, the validity of the questioned statute was upheld in *Gardner* v. *Broderick*, 20 N.Y. 2d 227, which case was cited in the opinion in this case as the basis for compelling the appellant to testify.

The significance of the question herein was recognized by this Court in that probable jurisdiction has been noted in *Gardner* and that case is presently pending before this Court.

A writ of certiorari was similarly granted in *Uniformed Sanitation Men's Association, Inc.* v. *Commissioner of Sanitation of the City of New York* (No. 823) wherein the same question was raised.

At the very least, this Court has recognized that importance of this question and indicated that it may still be an open one (see *Spevak* v. *Klein*, 385 U.S. 511, 516; *Stevens* v. *Marks*, 383 U.S. 234, 243).

That the question is federal in nature cannot be gainsaid and is equally inconsistent with a line of cases decided by this Court subsequently, holding that the Fourteenth Amendment prohibits not only arbitrary and summary dismissal from public employment but also compulsory self incrimination by the states. In *Malloy* v. *Hogan*, 378 U.S. 1, 6, this Court held that "the Fifth Amendment's exception from compulsory self-incrimination is also protected by the Fourteenth Amendment against abridgement by the states." This principle has been affirmed and upheld by this Court in subsequent decisions. *Murphy* v. *Waterfront Commission of New York Harbor*, 378 U.S. 52; *Stevens* v. *Marks, supra; Spevak* v. *Klein, supra;* and *Garrity* v. *State of New Jersey, supra.*

2. On the premise that Section 1123 of the New York City Charter is constitutionally valid and not tantamount to compulsory self-incrimination and a denial of due process, the court below contended that the state has the right to compel truthful testimony even if such truthful statements would be self-incriminating.

The constitutional repugnancy of such a holding is compounded where, under the facts herein, there was no conferral of immunity by statute or by operation of law (*Stevens* v. *Marks, supra*); nor was there a valid waiver of immunity sufficient to supplant the privilege against self-incrimination (*Stevens* v. *Marks, supra; Garrity* v *New Jersey, supra*) historically and legally the *quid pro quo* for the right of a state to demand incriminating testimony.

Similarly ignored was this Court's decision in *Garrity* in that the court below would permit testimony obtained

under a procedure requiring compulsory self-incrimination and constituting coercion, i.e., waive immunity and testify or forfeit livelihood, to be offered in evidence against the petitioner in a subsequent criminal proceeding.

The decision of the court below if left standing would stand for the proposition, unique in American jurisprudence, that a person may be criminally liable for failing to do that which he is constitutionally protected from being forced to do and which the state is expressly prohibited from requiring him to do.

Surely, at the very least, such a decision represents an innovation of such overwhelming significance that it deserves plenery consideration by this Court.

3. Even if the constitutional validity of Section 1123 of the New York City Charter was upheld, the decision below is in direct conflict with this Court's decision in *Stevens* v. *Marks, supra,* and *Garrity* v. *New Jersey, supra.*

The lower court herein conceded that the waiver of immunity executed by petitioner was "ineffective to prohibit him from raising his right against self-incriminating testimony bearing on a substantive crime * * *" (*infra,* p. 8a).

The supposed possession of the unwaived privilege is equally the foundation of the lower court holding herein in that since it remained to him he could have invoked it, thereby giving him an acceptable alternative to the repugnant perjury. To contend that the appellant possessed a viable privilege against self-incrimination is to abandon reality and to ignore *Stevens* and *Garrity.*

There, as here, petitioner was "led to believe that he could invoke his federal privilege against self-incrimination only on pain of losing his public employment; that to retain his job he was obliged to sign a waiver; and that should he sign a waiver he would have no immunity in answering incriminating questions."

As aforesaid, no immunity was conferred upon appellant by active conferral pursuant to statute (§2447 New York Penal Law); nor by operation of law; nor was it suggested that if he responded with incriminating answers any immunity might preclude a prosecution based on such answers. Nor was it suggested that at the very least he would be accorded testimonial protection so that if not completely immune from prosecution, his own statements could not be offered in evidence against him in a subsequent prosecution as decreed by *Garrity*.

Rather, he was actively misled to the contrary by statements upon which he had a right to rely. Appellant was placed in a dilemma even more imposing than the one characterized as the "Rock and the Whirlpool" characterized in *Garrity*. Suffice it to say his privilege against self-incrimination was effectively taken from him and no constitutionally accceptable substitute proffered.

At the very least, a significant and vital question exists as to whether the appellant's privilege against self-incrimination was violated and merits plenary consideration by this Court.

Conclusion

It is respectfully submitted that the Court should note probable jurisdiction of this appeal.

Dated, New York, N.Y.
February 23, 1968.

Respectfully submitted,

GOLDMAN & COOPERMAN
Attorneys for Appellant

ROBERT E. GOLDMAN
STEPHEN R. WIENER
Of Counsel

Appendix A

Applicable Provisions of the Constitution of the State of New York and the Charter of the City of New York

Article 1, Section 6 of the Constitution provides, in pertinent part, that no person shall:

> "be compelled in any criminal case to be a witness against himself, providing, that any public officer who, upon being called before a grand jury to testify concerning the conduct of his present office or of any public office held by him within five years prior to such grand jury call to testify, or the performance of his official duties in any such present or prior offices, refuses to sign a waiver of immunity against subsequent criminal prosecution or to answer any relevant question concerning such matters before such grand jury, shall by virtue of such refusal, be disqualified from holding any other public office or public employment for a period of five years from the date of such refusal to sign a waiver of immunity against subsequent prosecution, or to answer any relevant question concerning such matters before such grand jury, and shall be removed from his present office by the appropriate authority or shall forfeit his present office at the suit of the attorney-general.
>
> The power of grand juries to inquire into the wilful misconduct in office of public officers, and to find indictments or to direct the filing of informations in connection with such inquiries, shall never be suspended or impaired by law."

Section 1123 of the Charter provides:

> "Failure to testify.—If any councilman or other officer or employee of the city shall, after lawful notice

or process, willfully refuse or fail to appear before any court or judge, any legislative committee, or any officer, board or body authorized to conduct any hearing or inquiry, or having appeared shall refuse to testify or to answer any question regarding the property, government or affairs of the city or of any county included within its territorial limits, or regarding the nomination, election, appointment or official conduct of any officer or employee of the city or of any such county, on the ground that his answer would tend to incriminate him, or shall refuse to waive immunity from prosecution on account of any such matter in relation to which he may be asked to testify upon any such hearing or inquiry, his term or tenure of office or employment shall terminate and such office or employment shall be vacant, and he shall not be eligible to election or appointment to any office or employment under the city of any agency. (Derived from former Sec. 903.)"

Appendix B

Opinion of the Court of Appeals

STATE OF NEW YORK

COURT OF APPEALS

1. No. 417 67

The People &c.,

Respondent,

vs.

Lewis P. Goldman,

Appellant.

BREITEL, J.:

Defendant Lewis Goldman, a former New York City Police officer, appeals from an order of the Appellate Division, First Department, which unanimously affirmed, without opinion, his conviction on two counts of perjury in the first degree (Penal Law, §§1620, 1620a). In 1964 defendant had signed a limited waiver of immunity and testified before the Grand Jury of New York County which was then investigating bribery of public officials in connection with violations of the gambling laws. During his testimony, defendant denied that he had ever met one "Grumpy" Johnson, a gambler, or that he had ever received anything from Johnson in August, 1960. An indictment for perjury, based on these denials, was returned against defendant on July 19, 1965. After a jury trial in Supreme Court, New York County, defendant was convicted of perjury on March 14,

1966 and sentenced to a term of one year and six months to three years.

Relying on *Garrity* v. *New Jersey* (385 U. S. 493) defendant's primary contention is that the waiver of immunity signed by him prior to his testimony was wholly "void" because it was extracted on pain of losing his job (New York City Charter, §1123). Consequently, as he was a prospective defendant of the grand jury investigation, defendant claims that he could not be prosecuted for his allegedly perjurious testimony before that body "in the absence of a validly executed waiver of immunity." Alternatively, defendant argues that he was "deprived of due process" in that the events which formed the basis of his testimony before the grand jury and which led to his indictment for perjury occurred in 1960, more than four years before he was called as a witness. Finally, defendant argues that there was insufficient evidence to support his conviction because he never made a "clear and unequivocal" denial before the Grand Jury that he had known or received anything from the gambler, Johnson.

On September 29, 1964 defendant appeared before the Grand Jury and was informed of the purpose of its investigation. He was advised that he had a right to refrain from answering questions which he believed might incriminate him but that if he wished to retain his employment as a police officer, he was required to sign a limited waiver of immunity. Defendant was also informed that if he signed the waiver, "whatever you say may be used in evidence against you should you become a defendant." Defendant stated that he understood and, thereafter, signed the waiver.

Apart from some preliminary questions concerning his finances, the inquiry of defendant was confined to his activities on August 3, 1960 and, specifically, whether he had met the gambler, Johnson, on that date and received anything from him. Defendant was shown a photograph taken on that date by a hidden police motion picture camera which

depicted Johnson handing something to another man. While he conceded that the other man in the picture "looks like me," defendant gave the following answers when he was questioned about Johnson:

"Question: Do you know a policy gambler by the name of Johnson?

"Answer: No, sir.

"Question: Did you ever meet him?

"Answer: No, sir.

"Question: Did you ever talk to him?

"Answer: No, sir.

"Question: I direct your attention again to Grand Jury Exhibit 220 and ask you whether or not you, Patrolman Goldman, in August of 1960, ever received anything from Mr. Johnson?

"Answer: I don't even know Mr. Johnson, Mr. Andreoli.

"Question: Will you look at 220 [the picture] again?

"Answer: Yes, sir.

"Question: That shows a picture of a man, I will tell you his name is Mr. Johnson, handing something to a man standing on the stairway which you say looks like you?

"Answer: Yes, sir.

"Question: Did you, Patrolman Goldman, ever receive anything from the man shown in that picture?

"Answer: No, sir."

Upon further questioning, defendant stated several times that he did not recall being at the place where the picture was taken nor could he remember the incident depicted. When asked again, however, whether he had ever met Johnson, defendant said, without qualification, "No, sir."

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Upon further questioning, defendant stated several times that he did not recall being at the place where the picture was taken nor could he remember the incident depicted. When asked again, however, whether he had ever met Johnson, defendant said, without qualification, "No, sir."

At trial, after this testimony had been introduced, a Detective Robert Miles testified that, while in hiding, he had taken the photograph in question (a "still" excerpted from a motion picture film). Other pictures were introduced of the same incident and Detective Miles identified the two men in all the pictures as defendant and Johnson, a "known [policy] Gambler." Miles also testified that on two separate occasions during this incident, Johnson had handed money in bill form to defendant. The second payment was made after Johnson had received money from another gambler, William Larkins, and passed it on to defendant.

Another detective, Gerald Edwards, who had observed the meeting between defendant and Johnson, corroborated Miles' testimony and the identifications of the two men in the pictures. William Larkins also testified that he recognized one of the men in the photographs as defendant, who was known to Larkins only as "Louie * * * the Captain's Man."

Defendant testified in his own behalf and stated that he knew neither Johnson nor Larkins and had never received any money from them. While he admitted that one of the men in the pictures looked like him, defendant denied that it was he or that he had been there. On summation, counsel for defendant stressed that it was unfair for the District Attorney to delay defendant's appearance before the Grand Jury until 1964, four years after his alleged meeting with Johnson.

Turning first to the question of waiver, defendant urges that, as in *Garrity* v. *New Jersey* (385 U. S. 493, *supra*), the waiver he signed before his Grand Jury testimony was the product of coercion. In the *Garrity* case, decided almost a year after the trial in this case, the Supreme Court held that the failure of the police officers to raise their privilege against self-incrimination was motivated, not by free choice, but by the threat of removal from public office. Consequently, the testimony obtained under this "duress" could

not be used against them "in a subsequent prosecution for conspiracy to obstruct the administration of the traffic laws" (385 U. S. at 494). Defendant, assuming on the authority of the *Garrity* case that his waiver was therefore "invalid," concludes that, as he was a "potential defendant" before the Grand Jury, the oath "could not be legally administered to him" and he may not now be prosecuted for perjury, even if *People* v. *Gillette* (126 App. Div. 665) and subsequent decisions of this Court which have followed the *Gillette* rule were applicable. (But see *People* v. *Tomasello*, 20 N Y 2d , decided herewith.)

As defendant concedes, the *Gillette* rule, assuming that it were still a viable rule, does not obtain when the witness, albeit a prospective defendant or one of the subjects of the inquiry, waives his right against self-incrimination (see *People* v. *Yonkers Contr. Co.*, 17 N Y 2d 322, 324-325; *People* v. *Macner*, 171 Misc. 720, 722-723). Nor has the rule protected one who had been granted immunity from prosecution for any substantive crimes from penalties for perjurious or contumacious testimony (*People* v. *Reiss*, 255 App. Div. 509, 511-516, affd. 280 N.Y. 539; see *People* v. *Gittleson*, 18 N Y 2d 427). The basis for both of these exceptions is that, unlike the situation in the *Gillette* case, defendants who either waive or are granted immunity for substantive crimes may then be "legally" sworn (*People* v. *Reiss*, 255 App. Div. at 512, *supra*).

With this in mind, it is appropriate to consider the nature and effect of the waiver signed by defendant, particularly in the light of this Court's recent decision in *Gardner* v. *Broderick* (20 N Y 2d 227). In the *Gardner* case, the petitioner had been dismissed from the New York City Police Department for refusing to waive his privilege against self-incrimination when subpoenaed before the Grand Jury. Relying upon the *Garrity* case, petitioner contended that his discharge was "unconstitutional." The Court, while noting that any testimony taken from petitioner under this

waiver would be "inadmissible in a criminal prosecution," held, nevertheless, that petitioner's refusal to testify "bore upon his fitness to remain in office" and constituted "'employee insubordination'" for which he might be dismissed (20 N Y 2d at 230-231).

For present purposes, the importance of the *Gardner* case is its holding that a public officer may be validly compelled to testify before a Grand Jury even though his testimony would be the product of "duress"—namely, the threat of removal from public office. True, any waiver exerted by means of this coercive force would be ineffective to prohibit him from raising his right against self-incriminatory testimony bearing on a substantive crime, but it by no means follows that he can not be legally sworn. Quite the contrary, the *Gardner* case indicates that the oath may be validly administered to a public officer and testimony may be required of him.

And, if such an officer may be compelled to testify, there must, of course, be sanctions for perjurious or contumacious testimony. Otherwise, the result of the *Gardner* case would be largely meaningless: the officer must testify, if he is to keep his position, but he can, with impunity, lie, or even refuse to answer questions.

The most appropriate analogy is to the prospective defendant who is called before the Grand Jury and granted immunity from prosecution for substantive crimes. As noted above, such a witness was not protected by the *Gillette* rule, even before its restatement by this Court in *People* v. *Tomasello* (20 N Y 2d , *supra*) in that he may be validly sworn and subsequently prosecuted for perjurious or contumacious answers. The rationale for such a result was explained in *Glickstein* v. *United States* (222 U. S. 139). There, a witness who had been granted immunity under the Bankruptcy Act from prosecution for substantive crimes gave perjurious testimony. In upholding his conviction for perjury, the Supreme Court held:

> "* * * the statute expressly commands the giving of testimony, and its manifest purpose is to secure truthful testimony, while the limited and exclusive meaning which the [defendant's] contention attributes to the immunity clause would cause the section to be a mere license to commit perjury, and hence not to command the giving of testimony in the true sense of the word.
>
> "The argument that because the section does not contain an expression of the reservation of a right to prosecute for perjury in harmony with the reservations in Rev. Stat., §860, and the act of 1893, therefore it is to be presumed and it was intended that no such right should exist, we think, simply begs the question for decision, since it is impossible in reason to conceive that Congress commanded the giving of testimony, and at the same time intended that false testimony might be given with impunity, in the absence of the most express and specific command to that effect." (222 U. S. at 143)

It is interesting to note that in a recent California case involving facts substantially similar to those involved here, the court, relying on the *Glickstein* case, upheld the defendant's conviction for perjury (*People* v. *Genser*, 58 Cal. Rptr. 290 [Dist. Ct. of App., 1967]). Even though it does not appear that the California courts have held that a public officer may be dismissed for refusing to waive his privilege against self-incrimination when questioned about his official duties, the court in the *Genser* case distinguished the *Garrity* case and held that "one compelled to make sworn statements under compulsion such as illustrated by the facts at bench" does not have "a license to make untruthful statements" (59 Cal. Rptr. at 291, *supra*).

The import of *Gardner* v. *Broderick* (*supra*), like the statute involved in the *Glickstein* case, is that testimony

should be given by a public officer and "its manifold purpose is to secure truthful testimony." Even though the testimony may not be used against him in a prosecution for any substantive crime, he is not immune from penalties for crimes inherent in the giving of the testimony itself.

Defendant's additional contentions are of no merit. He contends that when his testimony before the Grand Jury is read as a whole, particularly in the light of his oft-reiterated failure of recollection on many details, it is impossible to isolate an outright denial that he ever met Johnson or received something from him. The contention is refuted by the record. While defendant repeatedly professed that he was unable to remember details, such as where he was on the particular day involved, he categorically denied that he knew Johnson, had ever met him, or received anything from him. The falsity of these denials was proved by the testimony of the People's witnesses.

Finally, defendant argues that the District Attorney unfairly delayed his appearance before the Grand Jury until more than four years had elapsed from the time of his meeting with Johnson. The contention is not answered by the fact that the indictment for perjury was brought within nine months after defendant's testimony before the Grand Jury (and therefore well within the five-year limitation of section 142 of the Code of Criminal Procedure). But, at most, the delay was a factor to be considered by the jury in determining whether defendant really could not remember meeting Johnson. Counsel for defendant recognized this by stressing the point in his summation, but the jury, in view of his outright denials on this score, must have found that the passage of time had not clouded defendant's memory—at least with respect to his dealings with Johnson.

Accordingly, the judgment of conviction should be affirmed.

• • •

Judgment affirmed. Opinion by Breitel, J. All concur.

Appendix C

Judgment of the Court of Appeals

COURT OF APPEALS

STATE OF NEW YORK, ss:

PLEAS in the Court of Appeals, held at Court of Appeals Hall in the City of Albany, on the 28th day of December in the year of our Lord one thousand nine hundred and sixty-seven, before the Judges of said Court.

Witness,
The Hon. STANLEY H. FULD,
Chief Judge, *Presiding.*
RAYMOND J. CANNON, *Clerk.*

Remittitur December 28, 1967.

---

1. No. 417 67

The People &c.,

Respondent,

vs.

Lewis P. Goldman,

Appellant.

BE IT REMEMBERED, That on the 14th day of September in the year of our Lord one thousand nine hundred and sixty-seven, Lewis P. Goldman, the appellant in this cause, came here unto the Court of Appeals, by Robert E. Gold-

man, his attorney, and filed in the said Court a Notice of Appeal and return thereto from the judgment of the Appellate Division of the Supreme Court in and for the First Judicial Department. And The People &c., the respondent in said cause, afterwards appeared in said Court of Appeals by Frank S. Hogan, District Attorney.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

WHEREUPON, The said Court of Appeals having heard this cause argued by Mr. Robert E. Goldman, of counsel for the appellant, and by Mr. H. Richard Uviller, of counsel for the respondent, and after due deliberation had thereon, did order and adjudge that the judgment of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is affirmed.

And it was also further ordered, that the records aforesaid, and the proceedings in this Court, be remitted to the Supreme Court of the State of New York, there to be proceeded upon according to law.

THEREFORE, it is considered that the said judgment be affirmed, as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Supreme Court of the State of New York before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to law, and which record now remains in the said Supreme Court, before the Justices thereof, &c.

RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York.

Appendix C

Court of Appeals, Clerk's Office,
Albany, December 28, 1967,

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

[SEAL]

RAYMOND J. CANNON
Clerk.

FILED
Jan 10 1968
Supreme Court
New York County
Appeal Bureau

LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
MAR 25 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1967

No. 1261

LEWIS P. GOLDMAN,
Defendant-Appellant,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

MOTION TO DISMISS OR AFFIRM

FRANK S. HOGAN
District Attorney
New York County
Attorney for Appellee
155 Leonard Street
New York, New York 10013

H. RICHARD UVILLER
Assistant District Attorney
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1967

No. .....

LEWIS P. GOLDMAN,
Defendant-Appellant,
against
THE PEOPLE OF THE STATE OF NEW YORK,
Appellee.

MOTION TO DISMISS OR AFFIRM

Statement

Having been duly served with a notice of appeal and jurisdictional statement on behalf of the appellant above named, the appellee herewith respectfully moves this Court to dismiss the appeal for want of a substantial federal question or, alternatively, to affirm the order of the New York Court of Appeals below summarily on the grounds that the decision was clearly in accord with controlling constitutional principles.*

* A copy of the brief for the People to the New York Court of Appeals has been lodged with the Clerk of this Court.

Argument

As the appellant notes in his jurisdictional statement, this Court has recently noted probable jurisdiction in a case testing the very issue presently urged here: the constitutionality of provisions of New York's State and City Charters which require public officers to give evidence, under waiver of immunity, concerning their public responsibility, or suffer loss of public office. In *Gardner* v. *Broderick*, 20 N.Y.2d 227, Misc. No. 635, the New York Court of Appeals clearly held that the decision of this Court in *Garrity* v. *New Jersey*, 385 U.S. 493, did not invalidate the pertinent provisions of New York law for all purposes. *Garrity*, according to the New York Court, held only that evidence procured under a waiver of immunity which is itself inherently "coerced" (as the public officers' limited waiver in New York would invariably be), could not thereafter be utilized against the officer as evidence of the substantive crime therein disclosed. But *Garrity* did not preclude the discharge of a public officer for failure to execute the waiver of immunity and testify thereunder. If the New York Court of Appeals was wrong in this construction of this Court's opinion, and the United States Constitution invalidates the State Constitution in this regard, then *Gardner* provides the vehicle for such a determination.

The *Goldman* case below rode upon the coattails of *Gardner*. It added only one corollary: a public officer in the grand jury under a waiver, protected against the future use of his testimony on a substantive charge concerning matter revealed by it, must answer truthfully and forth-

rightly. This virtually self-evident proposition by itself is not a substantial federal question. Indeed, insofar as it involves a federal question at all, the question merely reproduces, in scarcely altered form, the question already before this Court in *Gardner*.

It is also of some significance that *Gardner* was not taken up alone. To be argued along with it are two other New York cases which provide added dimension to the question: *Uniformed Sanitation Men's Association, Inc.* v. *Commissioner of Sanitation,* 383 F.2d 364 (2d Cir. 1967), Misc. No. 823, and *Campbell Painting Corp.* v. *Reid,* 20 N.Y.2d 370 (1967), Misc. No. 673. Moreover, the appellee herein is informed that the three cases are tentatively scheduled for argument sometime during the third week of April, 1968. Were *Goldman* to be added to the group at this late date, it would be virtually impossible to ready the case for the calendar slot already selected for the other three. Delaying argument of those three is no more palatable an alternative than scheduling *Goldman* for a later date.

These several factors demonstrate that *Goldman* neither adds nor amplifies a federal question of substantial significance. If *Gardner* v. *Broderick* was correctly decided, then without doubt, *Goldman* was, too. And if *Gardner* is thus resolved in this Court, *Goldman* will present no residual federal question. On the other hand, if *Gardner* was incorrectly decided, and the operative law of New York is void for all purposes, then the federal question raised in *Goldman* will, in all likelihood, be answered as well.

The foregoing considerations are, if is believed, equally applicable should the defendant's passing suggestion be accepted, and the appeal be treated by this Court as an application for a writ of certiorari.

Conclusion

The appeal should be dismissed for want of a substantial federal question or, alternatively, the order appealed should be summarily affirmed as fully consonant with the United States Constitution.

If the jurisdictional statement be deemed an application for a writ of certiorari, it should be denied.

Respectfully submitted,

FRANK S. HOGAN
District Attorney
New York County

H. RICHARD UVILLER
Assistant District Attorney
Of Counsel

March, 1968

SUPREME COURT, U. S.

FILED
JUL 10 1968
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1968

No. 1261

LEWIS P. GOLDMAN,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

PETITION FOR REHEARING

GOLDMAN & COOPERMAN
Attorneys for Appellant
122 East 42nd Street
New York, New York 10017

ROBERT E. GOLDMAN
Of Counsel

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IN THE

Supreme Court of the United States

October Term, 1968

No. 1261

LEWIS P. GOLDMAN,

Appellant,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Appellee.

On Appeal from the Court of Appeals of the State of New York

PETITION FOR REHEARING

Now comes the petitioner, Lewis P. Goldman, by his counsel, and respectfully prays for a rehearing on his Jurisdictional Statement and petition for a writ of certiorari previously filed with this Court (No. 1261). This petition is made because it is respectfully suggested that petitioner's application did not receive due consideration.

Because of the complex issues involved which were recently the subject of extensive deliberation by this Court, petitioner filed a Jurisdictional Statement and in the al-

ternative specifically requested certiorari consideration based on the nature of the questions presented. On June 17, 1968 this Court denied jurisdiction upon the ground that no substantial federal question was presented. However, the opinion remains silent as to the application insofar as the application for a writ of certiorari. In the event that this Court reiterates its opinion with regard to jurisdiction, then it is respectfully requested that specific attention be directed to the question of certiorari, especially in view of Mr. Justice Black's and Mr. Justic Douglas' opinion that the judgment of conviction should be reversed.

It is with all humility that petitioner suggests that this Court should accept this matter for review, particularly after this Court's decisions in *Garrity* v. *New Jersey,* 385 U. S. 493; *Spevak* v. *Klein,* 385 U. S. 511; *Stevens* v. *Marks,* 383 U. S. 234; *Gardner* v. *Broderick,* No. 635, October Term, 1967, decided June 10, 1968; and *Uniformed Sanitation Men's Association, Inc.* v. *Commissioner of Sanitation of the City of New York,* No. 823, October Term, 1967, decided June 10, 1968, with which the instant finding appears to be in conflict.

The sum total of the above decisions renders each and every step of the conduct of the Authorities in the instant case improper and invalid. *Gardner, supra* and *Uniformed Sanitation Men's Association, Inc., supra,* condemn the Hobson's choice of waiving immunity and testifying or forfeiting livelihood as it was presented to petitioner in the instant case. *Garrity* prohibits the attempted use in a subsequent criminal proceeding of any testimony obtained pursuant to such improper exercise of coercion.

The importance of the issues herein cannot be gainsaid and has been oft recognized by this Court as such. Initially, this appeal or application for a writ of certiorari is directed to the open question in *Gardner, supra,* to wit:

> "We need not speculate whether, if appellant had executed the waiver of immunity in the circumstances, the effect of our subsequent decision in Garrity v. New Jersey, supra, would have been to nullify the effect of the waiver."

This Court in the same opinion (*Gardner*) subsequently stated:

> "It is clear that petitioner's testimony was demanded before the grand jury in part *so that it might be used to prosecute him* and not solely for the purpose of securing an accounting of his performance of his public trust." (Emphasis supplied.)

To deny petitioner's application herein is in effect to decide the question about which it was made clear there was to be no speculation. The phrasing of the above question indicates that if this case were fully considered, the conclusion would indicate an intolerable violation of the privilege against self-incrimination.

This seems manifest since the waiver herein was obtained under the proscribed circumstances as indicated above, *i.e.,* for use in future prosecution, and not merely to obtain an accounting of the public trust.

Thus, the Court's action herein, or should it deny certiorari, is to permit a result totally inconsistent with its earlier decisions. In effect it acknowledges the validity of the waiver of immunity obtained under the instant circum-

stances in a case where a future prosecution is envisioned. While the Court infers that some validity possibly might exist where only the accounting is sought, that is not the case here. The circumstances herein clearly total a denial to petitioner of his privilege against self-incrimination.

It is difficult to comprehend how, in light of the foregoing, there is here presented no substantial federal question and therefore reconsideration is most respectfully requested.

In any event, since petitioner requested certiorari consideration, he should receive same. The question is certainly of substantial significance to warrant review as is indicated by the aforementioned cases. Here, petitioner was led to believe that he could invoke his federal privilege against self-incrimination only on pain of losing his public employment; that to retain his job he was obliged to sign a waiver and testify; and that should he sign a waiver he would have no immunity in answering incriminating questions and that he could not remain silent. All of the above which the petitioner was led explicitly to believe were inaccurate and erroneous and each has been held to be a violation of the constitutional privilege against self-incrimination. The result in the instant case was to place petitioner in a dilemma which this Court had previously stated it would not tolerate. *Garrity* v. *New Jersey, supra.*

Graphically, petitioner's quandry was as follows:

To ADMIT: Subject himself to criminal prosecution and imprisonment.

To DENY: Subject himself to prosecution for perjury.

To Refuse to Answer: Forfeit his livelihood and subject himself to prosecution for attempt.

Thus, to hold petitioner accountable for failure to do that which the State is prohibited from requiring him to do, and which constitutes clearly an abrogation of the privilege against self-incrimination cannot help but set a dangerous precedent in this case, possibly by inadvertence.

The circumstances herein cry out for an expression of opinion particularly, as aforesaid, in view of the fact that two justices favor summary reversal of the conviction.

In order that this case may receive the full consideration that justice requires, it is respectfully submitted that this petition for rehearing should be granted and that this case be given plenary consideration.

Respectfully submitted,

Goldman & Cooperman
Attorneys for Appellant
122 East 42nd Street
New York, New York 10017

Robert E. Goldman
Of Counsel

Certificate

I certify that this petition is presented in good faith and not for delay.

/s/ Robert E. Goldman

Robert E. Goldman
Counsel for Petitioner

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1967.

GOLDMAN *v.* NEW YORK.

APPEAL FROM THE COURT OF APPEALS OF NEW YORK.

No. 1261. Decided June 17, 1968.

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of a substantial federal question.

MR. JUSTICE BLACK and MR. JUSTICE DOUGLAS are of the opinion that the judgment should be reversed.